respondent on the ground that she had requested or authorized the appellant to carry out the additional works, and alternatively on the ground that, as proprietor of the land, the respondent was also owner of the building and she had had the benefit of those works.

With respect, I think the first proposition is fallacious. The principles to be applied are stated in *Halsbury* (2nd Ed.) Vol. XXXIV, page 458, as follows :

" Associations which are unincorporated, and which therefore are not legal entities, cannot, as associations, become parties to contracts. The liability for work and labour done for the benefit of such associations is determined according to the rules of law in regard to agency, and the parties who gave the orders for the work to be done are the persons liable upon the contract. Persons may, however, become liable on such contracts when they have given another person authority to make the contract, or when they have so conducted themselves as to lead the person employed to do the work to believe that they had given such authority, and that person acts in such belief."

With regard to the second proposition, the alternative ground may first be disposed of briefly. There is no evidence whatsoever on the record that the respondent became the registered proprietor of the land before all the additional works on the temple had been completed. Indeed all the evidence, such as there is, points to the contrary. Khoo Meng Kee, the Vice-Chairman & Treasurer said that he was the original proprietor of the land, and the respondent's uncontradicted evidence that she never signed any of the building plans is corroborated in the several plans that the appellant had produced, none of which bears any signature bearing the remotest resemblance to hers. It is well-known that building plans submitted for Municipality or Town Board approval must bear the signature of the registered proprietor. The answer to the appellant's argument on this point is to be found in most appropriate words in the judgment of Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (4)

" The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

There now remains only the contention that the respondent is liable to pay for the additional works because she had requested or authorised them. The learned trial Judge took the view that, since clause 6 of the building contract provided that the architect was to act in all matters under the contract on behalf of the "owner", and all variations in the works in so far as they were incorporated in amended plans by the architect were made by him as agent of the "owner" referred to in the contract, such "owner" must be the person or persons liable. With respect I entirely agree with his reasoning.

I should add that two other clauses in the contract are of material importance. Clause 10 provides that "any alterations whether as extras or omissions shall not vitiate this contract ... and all such extras or omissions shall be allowed for in the final settlement of account, but in no case will the contractor be allowed any extra payment without an order or written authority from the architect." Clause 17 further provides that "the owner shall, each time upon the presentation of the architect's certificate of payment, pay to the contractor an amount equivalent to that as stated in the certificate. An architect's certificate shall be the essence of this agreement in respect of payments to the contractor." At the hearing no certificate had been proved to have been given by the architect in respect of any of the extras for which the claim was made. I am therefore of opinion that, apart from the question of liability on the part of any person or persons under the contract, the appellant had entirely failed to prove his claim, and the learned trial Judge was right in dismissing the action with costs.

Accordingly I would dismiss this appeal with costs and order that the deposit paid into Court by the appellant be paid out to the respondent on account of such taxed costs.

Thomson C.J. and **Hill J.A.** concurred.

Appeal dismissed.

Solicitors: *Wahab, Singh & Peh; Braddell & Ramani.*

GOVERNMENT OF THE FEDERATION OF MALAYA v. SURINDER SINGH KANDA

[C. A. (Thomson C.J., Hill J.A. and Neal J.) December 9, 1960]

[K. L. — F.M. Civil Appeal No. 30 of 1960]

Constitutional Law — Federation of Malaya Constitution, Arts. 4, 132, 135, 139-141, 144, 148, 160, 162, 174-176 — Dismissal of Police Officer — Power of Commissioner of Police — Police Service Commission.

Police Ordinance, 1952, ss.9, 10, 19, 45 and 47 — Police Regulations, 1952.

Interpretation and General Clauses Ordinance, 1948, ss.14 and 29 — Meaning of "Subject to existing law and this Constitution" — Modification.

Natural justice — "Reasonable opportunity to be heard" — Bias.

Appeal — Cross-appeal — What is.

The respondent, an Inspector in the Royal Federation of Malaya Police Force was first appointed on probation in 1951 and permanently appointed to the rank of Inspector on June 1, 1953. On July 7, 1958 he was dismissed by the Commissioner of Police. Having exhausted his departmental rights of appeal, he commenced these proceedings on October 1, 1959. He asked for a declaration and other consequential reliefs stating that his purported dismissal on July 7, 1958 was void and inoperative and of no effect and that he was still a member of the said Police Force because: (a) the dismissal had been

effected by an authority subordinate to that which at the time of dismissal had power to appoint a member of the Police Force of equal rank and that this was contrary to Art. 135(1) of the Constitution, and (b) it was effected without him being given a reasonable opportunity of being heard (at the board of inquiry held by the Police Force) and that this was contrary to Art. 135(2) of the Constitution and natural justice. In the Court below ([1960] M.L.J. 115) Rigby J. held that Art. 144(1) was to be read with Art. 135(1) at the material time and that the power to appoint and consequently the power to dismiss officers of his rank was vested in the Police Service Commission and that the Commissioner of Police was an authority subordinate to the Police Service Commission and as such he had no power to dismiss him. He also held that even if the Commissioner had power to dismiss the plaintiff his dismissal as actually effected was contrary to natural justice and in breach of the Constitution because he was not afforded a reasonable opportunity of being heard. The learned Judge granted the declaration that the purported dismissal was void, inoperative and of no effect and that he was still a member of the said Police Force. On appeal,

Held: (1) the Commissioner of Police after August 31, 1957 still had the power to appoint superior officers and therefore there was nothing in Art. 135(1) which affected his power under section 45 of the Police Ordinance to dismiss such officer in general or Inspector Kanda in particular;

(2) in the light of the surrounding circumstances the charges against the respondent did not come to him as a bolt from the blue. To anyone with his knowledge of general police experience, the charges themselves must have conveyed to him the views regarding himself at which the Board of Inquiry had arrived. The only thing he was not aware of was the precise words in which the views were expressed. That being the case and there being no possibility of bias as far as the Board of Inquiry was concerned, the appeal should be allowed.

Per Neal J. (dissenting): "In my opinion after a consideration of the Constitution in its entirety, the combined effect of Arts. 140 and 144 is to create a Police Service Commission with jurisdiction over all members of the police service, which Commission shall perform its duties in accordance with the principles of and the procedure created by existing law as at Merdeka Day . . . . . ".

". . . . . If this construction previously given is at fault the Court is under a duty to bring into operation cl. (6) of Art. 162".

Decision of Rigby J. reported in [1960] M.L.J. 115 reversed.

Cases referred to:—

(1) *North-West Frontier Province* v. *Suraj Narain Anand* L.R. 75 I.A. 343.

(2) *Suresh* v. *Himangshu* (1951) 55 C.W.N. 605.

(3) *Smith* v. *London Transport Executive* [1951] A.C. 555, 565; [1951] 1 All E.R. 667.

(4) *R. Venkato Rao* v. *Secretary of State for India in Council* [1937] A.C. 248.

(5) *The High Commissioner for India & Anor.* v. *I.M. Lall* A.I.R. 1948 P.C. 121.

(6) *R.* v. *Queen's County, JJ.* [1908] 2 I.R. 285, 294.

(7) *R.* v. *Camborne Justices & Anor., Ex p. Pearce* [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850.

(8) *R.* v. *Duffy Ex parte Nash* [1960] 3 W.L.R. 320.

(9) *Franklin & Ors.* v. *Minister of Town and Country Planning* [1948] A.C. 87, 103, 105.

(10) *The Colonial Bank of Australasia* v. *Willan* (1873-74) L.R. 5 P.C. 417.

(11) *Frome United Breweries Co. Ltd.* v. *Keepers of the Peace and Justices for County Borough of Bath* [1926] A.C. 586, 590, 591.

(12) *In re Bidie* [1949] 1 Ch. 121, 129.

(13) *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91.

(14) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.

(15) *Benge & Pratt* v. *Guardian Assurance Co.* (1915) 34 N.Z.L.R. 81, 86.

(16) *R.* v. *Churchwardens of St. James, Westminster* 111 E.R. 1213, 1217.

(17) *Akistan Apena of Iporo* v. *Akinwande Thomas* [1950] A.C. 227, 234.

(18) *Dunkley* v. *Sullivan* [1930] 1 Ch. 84, 87; [1929] All E.R. Rep. 564.

COURT OF APPEAL.

C. M. Sheridan (Attorney-General) and *I. Talog Davies* (Senior Federal Counsel) for the appellant.

Jag-Jit Singh for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appeal from a decision of Rigby J. raises a question of some importance as to the interpretation of certain provisions of the Constitution.

The respondent was at all material times, and indeed claims still to be, an Inspector in what is now the Royal Federation of Malaya Police. He was first appointed on probation in 1951 and permanently appointed to the rank of Inspector on 1st June, 1953. On 7th July, 1958, he was dismissed from the Force by the Commissioner of Police and it is from that dismissal that the present proceedings arise.

Up to a point the circumstances leading up to Inspector Kanda's dismissal are not very seriously in dispute.

Some time in April, 1957, the Police in Penang obtained information, which clearly had some truth in it, to the effect that forged tickets in the Social and Welfare Lottery were in circulation. This was investigated and from a very early stage the respondent, Inspector Kanda, was either in charge of or otherwise personally engaged in the investigation. Eventually two men, Loh and Ang, were arrested and were committed for trial at the Penang Assize for possession of forged lottery tickets in contravention of section 474 of the Penal Code and abetment of that offence.

The two accused were tried before Rigby J. and a jury and were found not guilty and in the course of the trial it became probable that two police informers and at least two police officers had committed perjury. One of these police officers indeed admitted in Court that he had given false evidence and when subsequently prosecuted in the Magistrate's Court pleaded guilty to a charge of perjury for which he received a discharge without a conviction being recorded, in spite of which he is still a member of the Police Force. Another police witness was prosecuted for perjury but the prosecution was withdrawn apparently because it was thought it must fail on technical grounds. No proceedings were taken against the two police informers.

As a result of these events the Commissioner of Police set up a Board of Inquiry to enquire into the circumstances of the case. This Board consisted of three senior Police Officers and on a

number of days during the months of December, 1957 and January, 1958, took unsworn statements from a number of Police witnesses including the present respondent and the two Police informers who had given evidence at the forgery trial.

This Board produced a lengthy report dealing in detail with the affairs as a whole and the parts played in it by a number of individual Police Officers. It was accepted, and indeed at that stage the point was beyond controversy, that perjury had been committed at the forgery trial, but it was thought that the Police Officers who had conducted the prosecution case at the preliminary enquiry and supplied the evidence to prosecuting counsel at the Assizes had done so in good faith and believing the evidence to be true. As regards Inspector Kanda, however, there was evidence which, if it was true, shewed that he knew certain portions of the evidence proposed to be given at the forgery trial to be untrue, that he had encouraged the making of untrue statements and that he had kept to himself the knowledge that some of these statements were untrue. The Board described him as the "villain of the piece". They expressed the view that he had encouraged certain witnesses to give false evidence so as to "simplify the case and to cut short the evidence". As regards certain other evidence they expressed the view that his motive was "dishonestly to strengthen the case against both accused in order to ensure a conviction in Court". They concluded:—

"The Board were forced to the conclusion that Inspt. Kanda is a very ambitious and a thoroughly unscrupulous Officer who is prepared to go to *any* lengths, including the fabrication of false evidence, to add to his reputation as a successful investigator. The Board could not help wondering how many of his previous successful cases had been achieved by similar methods".

In consequence of this report it was decided to take disciplinary proceedings against Inspector Kanda and on 12th March, 1958, Mr. Strathairn, who had just been transferred to Penang as Chief Police Officer and who was junior to one of the members of the Board of Inquiry but senior to the other two members, was instructed to act as the Adjudicating Officer in such proceedings. He was furnished with a copy of the report of the Board of Inquiry and with the statements made by witnesses before that Board. He was also furnished with charges which after some variation were the charges which Inspector Kanda was later called upon to answer.

Although they gave rise to much argument at one stage of the proceedings, I do not think it is necessary to discuss these charges in detail here. Apart from a minor charge of disobedience to a lawful command by failing to subpoena a witness, they were to the effect that it was the duty of Inspector Kanda to prepare the Police Investigation Papers on which the prosecution case at the forgery trial would be based and that in doing so on each of four specified material points he dealt with the evidence in a way that could be regarded as either failing to disclose evidence in his possession, which is an offence against discipline by reason of regulation 2(a)(44) of the Police Regulations, or as submitting evidence which he knew to be false which amounted to conduct to the prejudice of good order and discipline in contravention of regulation 2(a)(65) of the Police Regulations.

These charges were communicated to Inspector Kanda and at a later stage the statements made by the witnesses before the Board of Inquiry were also communicated to him but the report of that Board which had been communicated to Mr. Strathairn was never at any material time communicated to him.

In due course Inspector Kanda appeared before Mr. Strathairn at a Police Orderly Room and in the event after taking evidence Mr. Strathairn found that the charges made against him were proved. In respect of the minor charge of disobedience Mr. Strathairn reprimanded him but in respect of the other charges he recommended that he be dismissed from the Police. There has never been any suggestion that these proceedings were not substantially in accordance with the provisions of the Police Regulations.

I do not think that what subsequently happened calls for very detailed examination. In the event Inspector Kanda was dismissed by a letter dated 7th July, 1958, and after he had unsuccessfully exhausted his departmental rights of appeal he commenced the present proceedings on 1st October, 1959.

In these proceedings he asked for a declaration that his purported dismissal on 7th July, 1958, "was void, inoperative and of no effect, and that he is still a member of the said Force" and for various consequential reliefs.

The grounds on which Inspector Kanda claimed his purported dismissal was "void, inoperative and of no effect" were, first, that it had been effected by an authority subordinate to that which at the time of the dismissal had power to appoint a member of the Police Force of equal rank and that this was contrary to Article 135(1) of the Constitution, and second, that it was effected without his being given a reasonable opportunity of being heard and that this was contrary to Article 135(2) of the Constitution and to natural justice

The case was tried by Rigby J., who dealt with it in a lengthy and wholly admirable judgment. He took the view that on a proper construction of Article 144(1) as read with Article 135(1) of the Constitution at the material time, which was the time of Inspector Kanda's dismissal, the power to appoint, and consequently the power to dismiss, officers of his rank was vested in the Police Service Commission and that the Commissioner of Police was an authority subordinate to the Police Service Commission and so by reason of Article 135(1) of the Constitution had no power to dismiss him.

That was enough to conclude the case in favour of Inspector Kanda, but His Lordship also dealt with the other ground on which Inspector Kanda's claim was based. That was that even if the Commissioner of Police had the power to

dismiss him, his dismissal as actually effected was contrary to natural justice and in breach of the Constitution in that he was not afforded a reasonable opportunity of being heard before an order of dismissal against him had been made. On this point His Lordship, after a very detailed examination of the facts, came to the conclusion that there had been a failure to afford Inspector Kanda a reasonable opportunity of being heard before he was dismissed. It is important, however, to observe that His Lordship based this conclusion on two things and two things only. One was that at the original disciplinary proceedings Mr. Strathairn was in possession of a copy of the findings of the Board of Inquiry into the circumstances of the abortive forgery trial. The other was that Inspector Kanda had not been supplied with a copy of these findings. His Lordship concluded:—

"In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the Plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal".

Having arrived at these results His Lordship gave judgment in favour of Inspector Kanda for a declaration that his purported dismissal from the Police was void, inoperative and of no effect and that he was still a member of the Police, for payment to him of his emoluments from the date of his dismissal on 7th July, 1958, the amount of these emoluments to be found on an inquiry, and for costs.

Against that decision the Government has now appealed, and of course such an appeal involves an attack on both of the groups of conclusions which led Rigby J., to his ultimate result. There is also what is called a "Cross appeal" by Inspector Kanda but I propose to disregard it beyond saying it should be formally dismissed because it does not ask that the decision of the High Court should be varied in any way but merely controverts a number of observations made by the trial Judge in the course of his judgment.

In the first place I propose to deal with the constitutional question of whether or not the Commissioner of Police had power to dismiss Inspector Kanda. Before doing so, however, it should be made clear that the Constitution which came into force on Merdeka Day, that is 31st August, 1957, was amended by Act No. 10 of 1960 with effect from 31st May, 1960. The material date in the present case is 7th July, 1958, the date of the purported dismissal of Inspector Kanda, and what we are concerned with, therefore, is the provisions of the Constitution as they stood subsequent to its coming into existence but prior to its amendment in 1960.

The law relating to what is now known as the Royal Federation of Malaya Police is to be found in the Police Ordinance, 1952 (No. 14 of 1952). Putting aside such functionaries as women police, extra constables and watch constables, the Ordinance divides members of the Force into four classes: gazetted police officers, superior police officers (which includes inspectors), subordinate police officers and constables.

As regards gazetted police officers, section 8 provides that such officers shall be appointed "in the same manner as other public officers of corresponding status in the service of the Government of the Federation, and shall be subject to the same disciplinary provisions". The Ordinance is silent as regards the discharge of such officers so the question of their discharge is governed by section 29 of the Interpretation and General Clauses Ordinance, 1948, by which, in brief, a power to appoint is to be construed as including a power to dismiss.

As regards superior police officers, subordinate police officers and constables, section 9 provides that such officers may be appointed by the Commissioner and section 10 provides that their appointments shall be for such periods as may be prescribed by Police Regulations.

A general power of discharge is contained in section 19 which provides that a superior police officer or subordinate police officer may be discharged by the Commissioner, and a constable may be discharged by the Commissioner or a Commanding Officer, at any time if unlikely to become an efficient police officer or physically or mentally unfit or on reorganisation or reduction of establishment. That general power, however, is subject to the proviso that except in certain specified cases no police officer is to be discharged under the section without the prior approval by an authority who prior to 31st August, 1957, was the High Commissioner in the case of superior police officers and the Chief Secretary in the case of subordinate police officers or constables and who since that date has been His Majesty in the case of superior police officers and in the case of subordinate police officers first the Minister of Defence and then, since 24th August, 1959, the Police Service Commission (see L.N. (N.S.) 1/57; L.N. (N.S.) 30/57; L.N. 294/59).

Apart from the provisions of section 19, section 45 provides that any superior police officer, subordinate police officer or constable who is found guilty by an officer authorised in that behalf of any offence against discipline shall be liable to such punishment in accordance with the provisions of the First Schedule to the Ordinance. That Schedule sets out a range of punishments from dismissal to punishment drill and provides *inter alia* that dismissal can only be imposed as a punishment on a superior police officer by the Commissioner of Police himself.

By section 47 any conviction and punishment imposed under section 45 is subject to appeal as prescribed by the Police Regulations. Originally in the case of a superior police officer who was dismissed that appeal was to the Chief Secretary, then from 31st August, 1957, until 23rd August, 1959, it was to the Minister charged with the responsibility for the Police, who was at that

time the Minister for Defence, and since 24th August, 1959, it has been to the Police Service Commission (see L.N. (N.S.) 1/57; L.N. (N.S.) 30/57 and L.N. 294/59).

It was under the provisions of section 45 that the Commissioner purported to dismiss Inspector Kanda and what is in question here is whether on 7th July, 1958, the date of the dismissal, the Commissioner still possessed the power to dismiss under that section.

That question has to be considered in the light of the relevant provisions of the Constitution relating to the Public Services.

Article 132 sets out what are the public services and these include the "general public service of the Federation" and what, prior to the 1960 amendments, was called the "police service" and is now called the "police force". The Article goes on to provide that the qualifications for appointment and the conditions of service of persons in these services may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong. Since the 1960 amendments the Article has provided (though it did not do so originally) that, except as expressly provided by the Constitution, every person in any of the services, except State services, holds office during the pleasure of His Majesty.

Then comes Article 135 which is of vital importance in the present case. The relevant portions read as follows:—

"135. (1) No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard".

That Article applies in terms to the "police service" which is the service mentioned in paragraph (d) of Article 132, and in the absence of any specific limiting words I think it clearly applies to all members of the police service, particularly when regard is had to the history of the corresponding Article of the Indian Constitution to which it corresponds, which is Article 311.

Similar provisions to those of sub-article 135(1) were to be found in section 34(1) of the Government of India Act, 1919 (section 96B of the 1929 Reprint) but when that section was in effect re-enacted by section 240(2) of the Government of India Act, 1935, it was provided by section 243 of that Act that notwithstanding the provisions of section 240 the conditions of service of the subordinate ranks of the various police forces in India should be such as might be determined by the various Indian Acts relating to these forces and this was held in the case of *North-West Frontier Province* v. *Suraj Narain Anand*[1] to exclude the subordinate ranks of the Police from the provisions of section 240(2) on the ground that liability to dismissal was a condition of service. When the Constitution of India came to be enacted section 240(2) of the 1935 Act was in effect re-enacted in Article 311(1) but section 243 was not re-enacted with the result that, as has been recognised by the Courts in India, subordinate members of the Police Forces are now entitled to the protection of Article 311(1) (see *Suresh* v. *Himangshu*[2]). Again provisions similar to those of the second sub-article of our Article 135 are to be found in section 240(3) of the Government of India Act, 1935, but no class of persons were excluded from the operation of that section and it became Article 311(2) of the Indian Constitution.

To return to our own Constitution, Articles 138 (now repealed), 139, 140 (now amended) and 141 set up Commissions to have "jurisdiction" over the members of each particular service. In particular, Article 140 provides for a Police Service Commission whose "jurisdiction" was prior to 1960 to extend to "all persons who are members of the Police service".

The functions of these Commissions (including the Police Commission) are set out in Article 144(1) which reads as follows:—

"Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends".

Although the word "power" does not occur in that Article it is clear from the use of the words "duty" and "jurisdiction" that, read with Articles 138, 139, 140 and 141 it would in the absence of any limiting words give the various Commissions set up by these Articles power to appoint members of the services over which they have jurisdiction. But there are limiting words. The Article commences with the words "subject to the provisions of any existing law and to the provisions of this Constitution". In my view, as a matter of construction these words limit the powers of the Commission and do not merely mean that these powers are to be exercised in accordance with any procedural requirements of the existing laws or of the Constitution. As was said by Lord Simonds in the case of *Smith* v. *London Transport Executive*[3] the words "are apt to enact that the powers thereafter given are subject to restrictions or limitations to be found elsewhere". Later (at p. 569) His Lordship said:—

"The words 'subject to the provisions of this Act' . . . . . are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found".

Here, then, the limitations upon the powers of the Commissions in general and of the Police Service Commission in particular are to be looked for in two places, in the Constitution itself and in the "existing laws".

As far as the Constitution is concerned there is no difficulty. Though it is no doubt true, at any rate in a popular sense, that the services

enumerated in Article 132 include all the functionaries of Government who could reasonably be regarded as public servants, it is clear, from the provisions of the Constitution itself, that all those functionaries are not to be appointed by one or other of the Commissions. In addition to the special provisions as to the appointment of Judges and the Auditor-General and certain other functionaries, there is Article 144(3) which provides that His Majesty may designate certain senior posts as special posts and that when he does so appointments to such posts are not to be made by the appropriate Commission but are to be made by His Majesty himself on the recommendation of that Commission and Article 144(4) which contains similar provisions as to similar posts in the services of the States.

As regards the "existing laws", these are defined by Article 160 as any laws in force in the Federation, or any part thereof, immediately before 31st August, 1957, and they are continued in force after that date by Article 162.

Here two things must be clearly borne in mind *in limine*.

The first is that the Constitution is a Constitution; that is to say, it does not purport to be a complete and exhaustive code of law dealing with every activity of the State and with every right and duty of the citizen. What it is, and what it purports to be, is an instrument setting out the organisation of the State, setting out the powers and relationships to each other of the various organs of the State and distributing among them the executive, the judicial and, what we are concerned with here, the legislative power.

The second point to be observed is that immediately before the coming into existence of the Constitution on Merdeka Day, 1957, the geographical territory to which that Constitution was to be applied was not a hitherto unoccupied territory on the moon, nor was it as the Garden of Eden before the Fall. It was a territory which was in existence and had a political identity under a different Constitution and which possessed a great body of law enacted by a variety of legislatures governing every aspect of the activities of the citizens. There was a body of criminal law, there was a body of civil law, there was a body of law affecting status and so forth and so forth.

The new Constitution made no attempt to deal in detail with the subject matter of that pre-existing body of law. As regards the future it vested the legislative power of the new State in Parliament as regards certain matters and in the legislative bodies of the constituent States as regards other matters. Clearly, however, these newly created legislative organs could not within any reasonable period of time provide the new State with the complete apparatus of law which is considered necessary in a modern State. If chaos were to be avoided the only practical step was to continue in existence the body of law that already existed and to make it clear that it spoke with the voice of authority as clearly as did the laws to be enacted by the newly legislative bodies.

This was sought to be done by Article 162 which is to be read in the light of Article 4(1) which reads as follows:—

> "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

Article 162 provides that the "existing laws", that is the laws in operation immediately before 31st August, 1957, shall continue in force after that date subject to any modifications made to them under the Article itself and subject to any amendments made to them by Federal or State law, that is to say, Acts of Parliament or laws made by the legislature of any State. From that it follows that any reference to the existing laws in any other Article of the Constitution must be held to be a reference to such existing law as it reads at whatever time may be material to the purpose for which such reference is made, that is to say, as modified or amended, if at all, as at the time of reference. That is, I think, clear from section 14 of the Interpretation and General Clauses Ordinance, 1948, which is in terms applied to the interpretation of the Constitution by Article 160.

Apart from amendment by legislatures constituted and recognised by the Constitution. Article 162 provides for modification of the existing laws in two ways.

The first is that His Majesty may within two years after 31st August, 1957, by order make such modifications in any existing law as appear to him necessary or expedient to bring the provisions of that law "into accord with the provisions of this Constitution".

The second is that where no modification order has been made by His Majesty any Court applying the provisions of an existing law at any time "may" do so "with such modifications as may be necessary to bring it into accord with the provisions of this Constitution". In both cases "modification" includes amendment, adaptation and repeal.

The Police Ordinance, 1952, was in force on 30th August, 1957, and thus is one of the "existing laws" within the meaning of Article 162. Since Merdeka Day its provisions for the appointment and dismissal of superior police officers have not been amended by Parliament. Neither have they been modified by His Majesty under Article 162, and indeed by reason of effluxion of time they cannot now be so modified. The only question, then, and to my mind it goes to the root of the present appeal, is whether this Court is required to modify them in any way in accordance with its power under Article 162.

One object of Article 162(6), the sub-article which gives the Court the power to modify, is clearly to avoid questions of implied repeal arising. If no such provision existed it might well be, in spite of Article 4, that some particular provision of an existing law inconsistent with some general provision of the Constitution would be treated as having been *pro tanto* repealed and there would thus be left a legislative *lacuna*. In

such a case the Court has the power to modify the provision in question rather than treat it as repealed by implication and in my view, in spite of the use of the word "may", the Court is under a duty to exercise that power in relation to any provision of the existing laws which would otherwise be treated as repealed by implication and to modify, that is to say amend, it so as to bring it into accord with the provisions of the Constitution.

But, is the present case a case where that power should be exercised ?

The Constitution itself if we were to exclude all references to existing law would provide that superior police officers (and indeed all police officers) should be appointed by the Police Service Commission, Article 135(1) says that no police officer can be dismissed by any authority subordinate to the authority which appointed him and in the present case the curious admission has been made on the pleadings that the Commissioner of Police is an authority subordinate to the Police Service Commission. Strange as it may appear to be I think we must accept that admission (which to me appears contrary to all reality) for the purpose of the present case and on it, considered in relation to Article 135(1), the Commissioner of Police would after 31st August, 1957, have no power to dismiss a superior police officer (or indeed any police officer) and the relevant provisions of the Police Ordinance which give him that power would therefore *ex facie* be inconsistent with the provisions of the Constitution and call for modification by the Court in accordance with Article 162(6).

That argument, however, overlooks the opening words of Article 144(1), "subject to the provisions of any existing law and to the provisions of this Constitution". These words clearly envisage that the Commission's power are to be limited by provisions of the existing law which are not the same as any provisions of the Constitution, for otherwise there would be no need to refer to the existing laws. Moreover, if the relevant provisions of the existing law are to be modified by the Court under Article 162(6) the modifications thus made could only be such as to make the existing law identical with the corresponding provisions of the Constitution. The effect of this, however, would again be to make the reference to the provisions of the existing law meaningless and a piece of surplusage. It is axiomatic that all the words of a statute are to be given some meaning, if possible. Here that principle requires that the reference to the existing laws in Article 144 be read as a reference to these laws subject to any amendment made to them by the legislature and not as subject to any modification to be made by the Court under Article 162.

We are not concerned here with the powers of His Majesty under that Article which have never been exercised in this connection and are now spent, but so far as the powers of the Court are concerned, these should only be exercised if it is necessary to exercise them and here it is not necessary to do so because the Article itself envisages the possibility of the existing law differing from the provisions of the Constitution.

I am thus led to the view that the Commissioner of Police after 31st August, 1957, still had the power to appoint superior police officers and therefore there was nothing in Article 135(1) which affected his power under section 45 of the Police Ordinance to dismiss such officers in general and Inspector Kanda in particular.

Although the argument is not in itself conclusive, I find some support for the views I have expressed in the wording of Article 135(1) itself to the effect that no member of the services mentioned in Article 132 (other than the armed forces) shall be dismissed by an authority subordinate to that which has power to appoint a member of that service of equal rank. The wording of that Article clearly contemplates that within any of the specified services persons of different ranks may be appointed by different authorities. If in every case only the appropriate Commission had the power to make appointments then one would have expected Article 135(1) to read that no member of any service should be dismissed except by the Commission having jurisdiction over that service.

I am not, of course, overlooking the extraordinary fact which was disclosed in evidence at the trial of the present case that since 31st August, 1957, superior police officers have in fact been appointed by the Police Service Commission and not by the Commissioner of Police. Unless the Government can persuade some Court in the future to take the view that the Police Service Commission has done so by reason of some legally permissible delegation of power to it by the Commissioner of Police, the conclusions at which I have arrived, and at which I hasten to add we have been invited to arrive, would seem to support the corollary that none of these functionaries appointed by the Police Service Commission have been properly appointed and this may cast some doubt on their legal capacity to exercise the powers and enjoy the protection accorded by law to Police Officers. That, however is beside the point. I am bound to state the law as I believe it to be without regard to any unfortunate consequences that may follow.

Before departing from this part of the case there are two observations I would wish to make.

The first is that I have not been unmindful of the Attorney-General's argument based on the case of *R. Venkato Rao* v. *Secretary of State for India in Council*[4] that apart from the provisions of the Constitution Government servants hold their offices during the pleasure of the Paramount Ruler and therefore their services may be terminated at any time. It is very likely that since the 1960 amendments there is such a power in the Paramount Ruler although it is not altogether clear whether there was such a power prior to 1960. The question, however, does not arise here for there is no question of Inspector Kanda having his services terminated by the exercise of any such power or purported power. What

happened here, and it is the only thing that happened, is that he was dismissed for misconduct by the Commissioner of Police under the powers vested in him by the Police Ordinance and there has never been any suggestion that his services were in fact terminated by anybody else or in any other way.

In the second place I would observe that at the material date, which was between 31st August, 1957, and 24th August, 1959, Inspector Kanda's right of appeal was to the Minister of Defence but the Minister in fact referred it to the Police Service Commission for consideration and the Commission considered it and advised its dismissal although it is clear from the correspondence that the Minister also applied his own mind to it before accepting the Commission's advice.

Having thus arrived at the result that on the material date the Commissioner of Police had power to dismiss Inspector Kanda the question then arises as to whether Rigby J., was right in holding that the purported exercise of that power was bad by reason of a failure to comply with the requirements of Article 135(2) of the Constitution that he should not be dismissed "without being given a reasonable opportunity of being heard".

I have had the benefit of reading the judgments which are about to be delivered by Hill J.A. and Neal J., and I am in agreement with what they have to say on this point. In the circumstances I propose to say only a few words of my own.

It has never been suggested that Inspector Kanda has not had an opportunity of being heard. Indeed since the very commencement of the disciplinary proceedings against him the voices of himself and his lawyers have been seldom silent. What is said is that he has not been given a "reasonable" opportunity of being heard. This allegation is based on a number of matters, some of them substantial and some of them so trivial that they can safely be dealt with somewhat summarily.

As has been pointed out, at the disciplinary proceedings before Mr. Strathairn Inspector Kanda was faced with two sets of alternative charges, and it was alleged by Inspector Kanda that at the conclusion of the proceedings he was not informed on which of these two sets of charges the Adjudicating Officer had found the case against him to be made out. This allegation is probably based not on any recollection of what actually took place, but on the rather carelessly worded letter of dismissal addressed to him on 7th July. 1958, which if read literally suggested that he had been found guilty on both sets of charges. The evidence, however, was to the effect that at the termination of the disciplinary proceedings he was verbally informed that it was on the first set of charges that he had been convicted and this was accepted as evidence of truth by the trial Judge. In any event it is difficult to see how Inspector Kanda could have been prejudiced in any way even if there had been a failure to inform him on which of the two sets of charges he was found guilty for as has been pointed out each set of charges was based on precisely the same facts and the only difference between them was that in the one set the facts were treated as *suppressio veri* while in the other they were treated as *suggestio falsi*.

Then it was said that after he had been informed that the charges against him were found proved Inspector Kanda was entitled to a second hearing by the Commissioner of Police in person to show cause why the punishment of dismissal should not in the circumstances be inflicted upon him.

That argument is based on the case of *The High Commissioner for India & Anor.* v. *I. M. Lall*[5] where in effect it was held that a member of the Indian Civil Service against whom disciplinary charges were made was entitled to be heard not only before the officer enquiring into these charges but also when the report of such officer was brought to the Public Services Commission with a view to his dismissal. That case, however, turned on the nature of the arrangements for disciplinary proceedings against civil servants in India which differ from those here and on the wording of section 240(3) of the Government of India Act, 1935 (now Article 311(1) of the Indian Constitution) which differs from the wording of Article 135(2) of our Constitution. In India an officer is not to be dismissed without being given a reasonable opportunity "of showing cause against the action proposed to be taken in regard to him", whereas with us the requirement is simply that he shall be "given a reasonable opportunity of being heard". In this connection, too, it must be borne in mind that here a Police Officer dealt with by the Commissioner of Police has a right of appeal which was in fact exercised by Inspector Kanda whereas in India there would appear to be no appeal from a decision of the Public Service Commission.

Finally, and this was the high water mark of Inspector Kanda's case and was indeed the ground on which he succeeded in the High Court, it was said that whereas Mr. Strathairn, the Adjudicating Officer in the disciplinary proceedings, was furnished with a copy of the report of the Board of Inquiry which enquired into the forged lottery tickets trial a copy of this report was not supplied to Inspector Kanda himself, although he had asked for it.

Now it is important to observe that this was looked at in entirely different ways by Inspector Kanda and by Rigby J.

Inspector Kanda's attitude was that this report was something he should have had prior to the disciplinary proceedings in order fully to appreciate the case against him and the case which he had to meet. In my view this complaint is entirely without substance when viewed in the light of all the surrounding circumstances. The charges against Inspector Kanda did not come to him as a bolt out of the blue. To begin with, he was intimately acquainted with the Police investigation of the forged lottery tickets case

for at all material times he was in charge of that investigation. It is difficult to suppose that he did not know what happened at the subsequent trial of that case. He knew, too, of the Board of Inquiry being set up. He was furnished with full statements made by the witnesses who gave evidence before that Board although there is some controversy as to whether he had access at that time, although he must have it earlier, to the investigation diaries of two of the detective officers concerned. Finally he was given a copy of the charges against him which resulted from the Board's enquiries. He is not mentally defective nor is he entirely innocent of any knowledge of the workings of the Police organisation. These things being so, it is impossible even to suppose that he was not aware and fully aware of the conclusions regarding himself at which the Board of Inquiry had arrived. To anyone with his general police experience and with his intimate knowledge of the whole lottery tickets affair the charges themselves must have conveyed to him the views regarding himself which the Board of Inquiry had formed. The only thing he was not aware of was the precise words in which these views were expressed. So much for his view of the matter.

Rigby J., however, looked at the matter in a way which calls for much more careful consideration. His view was that it was:

> " impossible to say that the findings of the Board of Inquiry must not inevitably have prejudiced the mind of the Adjudicating Officer against the plaintiff in relation to the disciplinary charges preferred against him. I do not for a moment suggest that on the evidence that he heard he would not have come to precisely the same finding on the disciplinary charge. But the very fact that he was furnished with, and read, the findings of the Board must, in my view, to put it at its lowest, have created a very real likelihood that he would have a predetermined bias or — to use the words of Lord O'Brien C.J., in the case of *R.* v. *Queen's County, JJ.*[6], — 'an operative prejudice, whether conscious or unconscious' against the plaintiff in respect of the disciplinary charges upon which he was to adjudicate".

Then, as I have already said, he came to the conclusion that the furnishing of a copy of the findings of the Board of Inquiry to the Adjudicating Officer coupled with the fact that no such copy was furnished to Inspector Kanda:

> " amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal".

In other words Inspector Kanda was not given a "reasonable opportunity" of being heard because there was a likelihood that the Adjudicating Officer who heard him would have a "predetermined bias" against him by reason of having read the report of the Board of Inquiry, although it is difficult to understand how this would have been otherwise had a copy of the report been supplied to Inspector Kanda.

In proceedings at a Police Orderly Room the Adjudicating Officer is acting at the very lowest in a quasi-judicial capacity. That being so the most suitable test to be applied in the present case is probably to be found in the judgment of Slade J., in the case of *Regina* v. *Camborne Justices & Anor. Ex parte Pearce*[7]. After considering a number of cases including *Rex* v. *Justices of Queen's County, supra,* His Lordship said (at p. 51) :—

> "To disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceedings, a real likelihood of bias must be shown".

Again, with regard to the possibility of a judicial officer being influenced by the opinions of others I would quote the words of Lord Parker C.J., in the case of *Reg.* v. *Duffy, Ex parte Nash* [8] where His Lordship said (at p. 327) :—

> "The question always is whether a Judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?"

With regard to this question of whether there was any real likelihood of Mr. Strathairn being prejudiced in any way by having sight of the report of the Board of Inquiry I would repeat some of what I have said in relation to Inspector Kanda. Mr. Strathairn was a Police Officer and having reached the position of being Chief Police Officer in the State of Penang it is safe to assume that he was a Police Officer of very long experience and one very familiar with the organisation and ways of the Police Force, even although as he himself admitted in evidence this was the first occasion on which he had acted as Adjudicating Officer in a case of this sort. By reason of having seen the statements made before the Board of Inquiry, which it was necessary he should see by reason of the nature of the procedure at a Police Orderly Room and having seen the charges on which he was instructed to adjudicate he would have been well aware of the contents of the Board's report even if he had not seen it. Some of the actual words used by the Board are perhaps peculiar. The actual words, however, are of little importance. To any experienced Police Officer, to Mr. Strathairn and to Inspector Kanda alike, given the statements and given the charges it was as clear as a pikestaff that the Board had formed the opinion that Inspector Kanda had played a leading part in an attempt to produce what would have been a miscarriage of justice. That in the nature of things was unavoidable.

The truth, however, is that there is not a scrap of evidence to show that Mr. Strathairn had any sort of personal bias against Inspector Kanda. He had the benefit, which the Board of Inquiry did not have, of having the witnesses cross-examined by Inspector Kanda. There is nothing to suggest that he was not well aware of what his duty was, that it was to form an unbiased independent judgment of his own on the evidence as it was given before him nor is there anything to suggest that he failed in any way in doing his duty.

I am not at all sure what Lord O'Brien C.J., had in his mind in referring to "an operative

prejudice, whether conscious or unconscious" in the Irish case [6] that has been mentioned (but of which I have not seen the report). Here, however, I can find no evidence of anything of the sort and it would be wrong to speculate as to the bare possibility of its existence. It has long been a forensic commonplace that it is impossible for a Court to know the conscious mind of man. How then can we know what is in his unconscious mind which is something he himself does not know? In all the circumstances of the present case I should have thought if there was any question of unconscious bias it would be an unconscious bias in favour of Inspector Kanda resulting from the efforts of an honest man (there is no suggestion that Mr. Strathairn is not an honest man) to do his duty and not allow himself to be affected by improper considerations.

It is most unfortunate that the case of *Pearce, supra,* was not brought to the notice of the learned trial Judge. And of course *Reg.* v. *Duffy, supra,* was not decided until after the present case. Had those cases been available to Rigby J., and had he in the light of them applied the test of whether, in the words of Slade J., there was a "real likelihood of bias" or whether, in the words of Lord Parker, there was "a real risk as opposed to a remote possibility" of a fair hearing being prejudiced, it is at the lowest possible that, as I do now, he would have answered the questions embodied in these tests in the negative.

In all the circumstances of the case I would allow the appeal and make an order in favour of the appellant for costs here and in the Court below and I would formally dismiss Inspector Kanda's cross-appeal.

Hill J.A.: This is an appeal by the Government of the Federation of Malaya against the decision of the High Court, Penang, in Civil Suit No. 232 of 1959 given on the 24th March, 1960.

The respondent was the plaintiff in the Court below. His substantive rank in the Police Force was that of Police Inspector. On the 7th day of July, 1958, he was dismissed from the Police Force by the then Commissioner of Police.

The respondent claimed a declaration that his dismissal from the Federation of Malaya Police Force purported to be effected by one, Mr. W. L. R. Carbonell, the then Commissioner of Police of the Federation of Malaya on the 7th day of July, 1958, was void, inoperative and of no effect and that he was still a member of the said Police Force. He further asked for orders directing that an account be taken of the salary and emoluments due to him as from the date of his allegedly invalid dismissal and the payment to him of the amounts found to be due.

The plaintiff based his claim on two grounds, one a matter of law, and the other of mixed law and fact. First, he contended that, as a matter of law, by virtue of the Federal Constitution which became the supreme law of the Federation of Malaya as from the 31st day of August, 1957, the powers of appointment and dismissal of Superior Police Officers were no longer vested in the Commissioner of Police but had become vested in the Police Service Commission. Secondly, he contended that even if the power of dismissal was still vested in the Commissioner of Police his dismissal was invalid in that he was deprived of the fundamental right of being given a reasonable opportunity of being heard before the order of dismissal was made against him.

On the first ground, after considering the provisions of the Police Ordinance 1952, and the Constitution, the learned trial Judge stated:

> "In my view, bearing in mind what I conceive to be the purport and intent of the provisions of Part X of the Constitution, the previously existing statutory powers of the Commissioner of Police to appoint, confirm, promote, and dismiss Superior Police Officers were impliedly revoked by Article 144, which places such powers in the hands of the Police Service Commission and, to that extent, the relevant Sections of the Police Ordinance conferring these powers upon the Commissioner of Police must be regarded as 'modified,' that is to say, repealed".

Finally the learned trial Judge stated:

> "In my view, on a construction of Article 144(1), read in conjunction with Article 135(1) of the Federal Constitution, at the time of his dismissal, the power to appoint and consequently the power to dismiss — the plaintiff was vested in the Police Service Commission, and the Commissioner of Police, as an authority subordinate to the Police Service Commission, had no power to dismiss him. I should, perhaps, add that the fact that the Commissioner of Police is an authority subordinate to the Police Service Commission is expressly admitted by the defendants in their pleadings. It follows that, in my view, the plaintiff's purported dismissal by the then Commissioner of Police on the 7th day of July, 1958, was void and inoperative, and he is accordingly entitled to the declaration and consequential orders which he seeks in his Statement of Claim".

The learned trial Judge then dealt with the second ground of the claim. He dealt most comprehensively with the facts. For the purposes of this appeal I think a bare outline of the facts is all that is necessary.

In December 1957 a Board of Inquiry was appointed by the then Commissioner of Police to enquire into the failure to obtain convictions in a forged lottery tickets case. The Board sat during December 1957 and January 1958 and recorded unsworn statements from a number of witnesses. The findings of the Board were extremely adverse to the respondent. Its Report stated *inter alia* that Inspector Kanda is the villain of the piece. The Board found not only that Inspector Kanda had suborned the Police witnesses with the object of simplifying and short-circuiting certain evidence, but also that he had suborned the two Police informers with the very much more sinister motive "dishonestly to strengthen the case against both accused in order to ensure a conviction in Court". In paragraph 72 of its Report the Board stated that they were "forced to the conclusion that Inspector Kanda is a very ambitious and a thoroughly unscrupulous officer who is prepared to go to *any* lengths, including the fabrication of false evidence, to add to his reputation as a successful investigator. The Board could not help wondering how many of

his previous successful cases had been achieved by similar methods".

The next step was the appointment of Mr. H. W. Strathairn, acting Chief Police Officer, Penang, as Adjudicating Officer to hear charges that had been preferred against the respondent. Enclosed with his letter of appointment was a copy of the findings of the Board of Inquiry.

At this stage I think it will be convenient to deal separately with the two grounds of the respondent's claim.

In dealing with what I will call the constitutional question that is whether the Police Commission or the Commissioner of Police had the power on the 7th day of July, 1958, to appoint and to dismiss Officers of the respondent's rank, I think the following articles of the Constitution at that date should be considered, namely Articles 4(1); 135(1); 140(1); 144(1); 160 and 176.

For ease of reference the relevant portions of these Articles are set out below:—

"4(1). This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

"135(1). No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank".

"140(1). There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the Police Force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, emplacement on the permanent or pensionable establishment, promotion, transfer and exercise of disciplinary control over members of the Police Force".

"144(1). Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends".

"160(2). In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

'Existing Law' means any Law in operation in the Federation or any part thereof immediately before Merdeka Day";

"176(1). Subject to the provisions of this Constitution and any existing law, all persons serving in connection with the affairs of the Federation immediately before Merdeka Day shall continue to have the same powers and to exercise the same functions on Merdeka Day on the same terms and conditions as were applicable to them immediately before that day.

(2). This Article does not apply to the High Commissioner or the Chief Secretary."

Article 4(1) appears to establish that laws existing before Merdeka Day are not void because of inconsistency with the Constitution.

By Article 135(1) the power to dismiss is vested in the authority having the power to appoint.

Article 140(1) gives the Police Commission the necessary jurisdiction, subject to Article 144, over members of the Police Service.

Article 144(1) imposes on all Commissions the duties therein set out, subject to the provisions of any existing law and to the provisions of the Constitution.

The question that this Court is required to answer is what is the meaning of Article 144(1) of the Constitution. In the first place I think it is essential to bear in mind that the jurisdiction of the Police Commission conferred by Article 140 is subject to the provisions of Article 144 and therefore also subject in my view to the provisions of existing law.

I consider the words "subject to" should be construed in this context as words of limitation or restriction in conformity with what was said in *Smith* v. *London Transport Executive*[3].

It seems to me that the answer to the above question must depend on what is meant by existing law.

By the definition of "existing law" in Article 160 the Attorney-General contended that meant a law in operation immediately before Merdeka Day. That the definition does not refer to a law in operation on Merdeka Day and that therefore excluded any question that "existing law" meant a law modified by Article 162 because that Article was not itself in operation immediately before Merdeka Day.

When considered in relation to Article 176(1) the Attorney-General's contention appears to me eminently reasonable. The powers and functions contained under this Article remain in existence unless and until modified in accordance with the provisions of Article 162.

At the risk of over-simplifying what is undoubtedly an important constitutional issue, I find it sufficient to say that I am in agreement with the argument of the learned Attorney-General. It appears to me to be consistent with each and every of the Articles I have referred to and which are relevant to this appeal.

The Police Ordinance 1952, was therefore in my opinion, an "existing law" as defined by Article 160. By section 9(1) of this Ordinance the Commissioner of Police is empowered to appoint a Superior Police Officer, and section 45 in conjunction with the 1st Schedule to the Ordinance empowers the Commissioner of Police to dismiss such an Officer who is found guilty of an offence against discipline. The respondent was a superior Police Officer.

What then is the meaning of Article 144(1)? I see no reason why the words of this Article should not be given their plain, ordinary meaning and feel that by doing so no inconsistency or frustration of the Article is created in the light of Article 4(1) and the definition in Article 160. Moreover, it is to be observed again that by Article 176 the powers of the Commissioner of Police were continued on Merdeka Day.

The disciplinary powers remaining with the Police Commission are to be found in section 8(1) of the Police Ordinance and it follows in my opinion that the purpose of Article 144(1) is not

defeated or frustrated by giving it the above meaning.

We were referred to the recommendations in the Reid report with regard to the preservation of the Commissioner of Police's powers. Without, however, taking this aspect into consideration I am of the opinion that on the 7th day of July, 1958 the then Commissioner of Police had the power to dismiss the respondent.

I appreciate that the above opinion, if correct, will mean that appointments of Police Inspectors made by the Police Commission since Merdeka are *ultra vires* the Constitution, the power to appoint such persons being still vested in the Commissioner of Police. It is not, however, for me to suggest the remedy. Moreover, in view of my interpretation of Article 144(1) I do not consider any modification of the Police Ordinance is necessary, as contemplated by Article 162(6), by this Court.

The only other meaning I can contemplate for Article 144(1) is to interpret it as providing by implication for the substitution of the Police Service Commission for the Commissioner of Police in the Police Ordinance and imposing on the Commission the duty to appoint, etc., subject to the provisions of the Police Ordinance. But this is in itself a modification by way of amendment of that Ordinance and, as I see it, does not give to the words of the Article their plain ordinary meaning. For these reasons I feel compelled to reject this alternative.

With regard to the second ground of respondent's claim Rigby J. felt obliged to set aside the Orderly Room proceedings before the Adjudicating Officer as he felt there had been such a denial of natural justice. He set out his reasons for this conclusion as follows:—

"But the inference appears to me irresistible that his mind must have been seriously prejudiced, whether consciously or unconsciously, against the plaintiff by the most damning Findings that he had before him contained in the unanimous Report of the Board of Inquiry presided over by Mr. Yates. In my view, it was contrary to the fundamental principles of justice which govern a fair trial that the Adjudicating Officer should have had before him, both before and during those disciplinary proceedings, the wholly adverse Report of the Board of Inquiry against the accused person whom he was then trying on these charges.

But the matter does not end there. Whilst the Adjudicating Officer had before him a copy of these Findings no such copy had been supplied to the plaintiff even though they most materially and injuriously affected him not only in relation to the disciplinary charges which he was then facing, but also as to the matter of sentence upon his conviction on those charges. He had no opportunity to deal with the Findings contained in that Report or to refute or challenge them in any way.

In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal".

I fully appreciate the learned trial Judge's anxiety to ensure that justice should not only be done but should appear to be done, but in the final result it is the reality not the appearance that is the ultimate aim. In this instance it is to be observed that the respondent did not base his claim on bias or prejudice on the part of the Adjudicating Officer nor did he produce any evidence to suggest such a state of mind.

The respondent's case was that in breach of the provision of Article 135(2) of the Constitution he had been dismissed without being given a reasonable opportunity of being heard (a) before conviction, and (b) after conviction and before sentence.

It is possible that the Adjudicating Officer was unconsciously prejudiced owing to the procedure adopted, but there is no evidence that he was. On the contrary, with reference to two witnesses who the Adjudicating Officer was instructed to call after the termination of his inquiry on 10th May, 1958, he had this to say (page 82 of record):

"In considering which witnesses should be called at the Defaulter Report proceedings I had deliberately omitted calling these two witnesses since I realised that their evidence might be very prejudicial to the accused".

To my mind such a statement indicated a complete lack of bias on the part of the Adjudicating Officer.

It is to be remembered too that the proceedings adopted were the usual Police proceedings and in conformity with the Police Regulations. Such proceedings could invariably result in unconscious bias in the mind of any or all Adjudicating Officers as a result of knowledge of the proceedings before and the findings of Boards of Inquiry.

The respondent was clearly familiar with this procedure and he stated before the Adjudicating Officer (I have seen the original record of the Orderly Room Inquiry) that he knew the charges against him were the result of investigations of the Board of Inquiry. Had it been necessary for this astute officer to know the findings of the Board for the purposes of his defence, he could have asked for them. I cannot believe that he could not have known of their existence.

Article 135(2) of the Constitution states that no member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

On this aspect of the case the learned trial Judge found as follows: (p. 129 and 130 of record).

"The argument put forward on ground (a) is that copies of various statements made by witnesses and copies of Police documents for which he had asked before his trial as being relevant to his defence were either not supplied to him at all, or supplied too late to give him an adequate opportunity to prepare his defence. Subject to one vitally important qualification, to which I shall later refer, I am satisfied that copies of all documents relevant to his defence were supplied to him, and I find no substance in this contention.

As to ground (b), Mr. Jag-Jit Singh submitted on the authority of the decision of the Privy Council in the case of the *High Commissioner for India* v. *I.M. Lall* (5) that the plaintiff had a right to be heard both at the time when the charges against him were being inquired into by the Adjudicating Officer and after conviction when the question arose as to the proper punishment to be awarded.

I accept that as correct. I have already said that I am satisfied that the Adjudicating Officer, after notifying the plaintiff that the case against him on the original charge had been proved, intimated to him sufficiently clearly that in view of the serious nature of the charge he proposed to recommend his dismissal. The plaintiff was then asked if he had anything to say and what he did say was duly recorded by the Adjudicating Officer and forwarded to the Commissioner of Police, for his consideration as to whether or not he should confirm the recommendation for his dismissal. In my view that was a sufficient compliance with the requirements of Article 135(2)."

With this finding I respectfully agree and this quite irrespective of whether the decision of the Privy Council in the case of the *High Commissioner for India* v. *I. M. Lall*[5] applies.

Rigby J. further stated:

"I do not for a moment suggest that the proceedings were not conducted by the Adjudicating Officer with the maximum fairness and impartiality nor, I repeat, do I suggest that on the evidence called before him he was not perfectly entitled to find the charges against the plaintiff fully proved and to recommend his dismissal".

With this view I entirely agree. But I cannot agree as the learned Judge went on to state that the inference appears irresistible that the Adjudicating Officer's mind must have been seriously prejudiced, whether consciously or unconsciously, against the respondent. I repeat that in my view such a prejudice is a bare possibility only and not to be inferred as an irresistible inference from the evidence or from the circumstances of the Orderly Room proceedings.

It follows therefore that I am unable to agree with the learned trial Judge that the proceedings before the Adjudicating Officer were in any way a denial of natural justice.

I have not mentioned the numerous decisions which were cited to us for though I have referred to them I have come to the above conclusions on my own interpretation of the relevant Articles of the Constitution and for the other part on the facts found to be established by the learned trial Judge and from the record.

I would therefore allow this appeal and set aside the whole of the decision of the lower Court. The appellant to have the costs here and in the Court below. I would also dismiss the cross-appeal.

Neal J.: The respondent in his statement of claim claimed that he was entitled to a declaration together with ancillary relief to the effect that his dismissal alleged to have been effected by the then Commissioner of Police on the 7th July, 1958, was void, inoperative and of no effect, and that he is still (as at the date of his statement of claim on 10th October, 1959) a member of the said force. His claim that it was void — I think without any injustice to him — may be adequately summarised as being based upon the following grounds:—

(i) That the Constitution of the Federation of Malaya in giving jurisdiction to a Police Service Commission had impliedly repealed that part of the Police Ordinance which gave jurisdiction to the Commissioner of Police.

(ii) That the respondent had not been given his rights under the Constitution, that is to say, he was not given a reasonable opportunity of being heard. This ground he sub-divided into two distinct allegations —

(a) that he had not been supplied with a copy of the findings of an earlier Board of Enquiry not in respect of the actions of any particular officer but in respect of the actual investigation which formed the basis of the charges upon which he was found by a separate tribunal to be guilty; and

(b) that he had not been informed before his plea in mitigation of the intended punishment — to put it another way, that he was entitled to be informed of the intended punishment and thereafter to be heard on that particular question.

The appellant in his statement of defence denied the lack of jurisdiction in the Commissioner of Police and contended that by virtue of the provisions of the Constitution the right or power of the Commissioner of Police to dismiss as it existed prior to Merdeka Day was continued in force by the operation of Article 144(1) of the Constitution, and that there had been no failure to comply with the provisions of Article 135(1). (A point was made before us that the appellant having admitted paragraph 7 of the statement of claim which read: "On the 7th July, 1958, the said W. L. R. Carbonell, Commissioner of Police, was an authority subordinate to the said Commission" had admitted all that was necessary to justify or to support the decision in favour of the respondent. It is true in paragraph 3 of the amended statement of defence the appellant/defendant does in terms state that, *inter alia*, paragraph 7 of the plaintiff's statement of claim is admitted. However, in my opinion, this point has no merit when one considers paragraph 6 of the statement of claim and the terms in which in paragraph 2 of the amended statement of defence the appellant/defendant does not admit the said paragraph 6. Read as a whole the statement of defence is, in my opinion, clear that the appellant/defendant is not admitting that the Police Service Commission is or was at the date of the dismissal the body entitled to appoint an officer of the rank of the respondent).

At the conclusion of the evidence, Rigby J. reserved his decision and in a written judgment subsequently delivered made the following orders:

(i) The declaration as asked for but not limited — in effect to the date of the statement of claim. (In fairness to his Lordship it ought to be made clear that in his judgment he merely makes the declaration as prayed in the statement of claim. The difficulty that arises in this case only arises because the Senior Assistant Registrar in issuing the formal order of the Court pursuant to that judgment uses the same words, namely, "and that he is still a member of the said Force", which must of course be construed with reference to the actual date of Rigby J.'s judgment. In my opinion the criticism of the judgment of Rigby J. on this account must be read in conjunction with the grave doubt that I have whether Rigby J. did say or intend to say in the declaration that he made as opposed to the declaration which the Senior Assistant Registrar says he made that the respondent was at the 24th March, 1960, still a member of the Force).

(ii) An account to be taken of the moneys due to the respondent from the 7th July, 1958, to the date of payment and the payment of such sum due after the taking of such account.

(iii) Remitting the proceedings to the Senior Assistant Registrar to take such an account.

(iv) Costs to the plaintiff.

In the course of his judgment dealing with the question of whether or not respondent was entitled to the declaration he asked for the learned Judge reached the following conclusions:—

(i) that on a proper construction of the Constitution without exercising the special power given to the Court by Article 162(6) the body having the power to appoint a Police Officer of the grading of the respondent was the Police Service Commission and not the Commissioner of Police.

(ii) that if that conclusion were incorrect the Court should exercise its powers under Article 162(6) and modify the Police Ordinance to the extent of repealing the powers of the Commissioner of Police.

(iii) that there was no substance in the argument on behalf of the respondent based upon Article 135(1), that the failure to inform him of the punishment and to give him the right to be further heard had constituted a breach of Article 135(1).

(iv) that the adjudicating officer who presided at the disciplinary proceedings against the respondent as opposed to the previous Board of Enquiry must be held to have been biased because he had received from one of his senior officers the findings of the Board of Enquiry in which that senior officer had expressed a view that was condemnatory of the respondent; that this document had not been given to the respondent and that he had had no opportunity of being heard upon it and the inference to be drawn from it.

The appellant appeals against the decision on the following broad grounds:—

(i) that by virtue of Article 144(1) that the Commissioner of Police was at the relevant date a person entitled to dismiss and that no jurisdiction to dismiss or even to appoint was given to the Police Service Commission by virtue of the Constitution.

(ii) that the Court below was wrong in exercising its alleged powers under Clause 6 of Article 162 since it was not necessary for bringing the Police Ordinance into accord with the Constitution.

(iii) that the respondent having been given an opportunity after he had been found by the Adjudicating Officer guilty of one charge to plead in mitigation he was not entitled having made that plea in mitigation to a further opportunity of being heard after the Adjudicating Officer had reached a conclusion as to the appropriate punishment he should recommend.

(iv) that the possession of the findings of the Board of Enquiry and the knowledge of their contents before commencing the hearing did not in itself, and standing alone, constitute bias to the extent required in accordance with the principles of natural justice to declare the proceedings void.

(v) that the learned Judge in the Court below was wrong in law in extending his declaration beyond the date in the statement of claim (I am not clear whether the Attorney-General on behalf of the appellant did not during the course of argument accept the position that that date might be capable of extension to the date on which the hearing of evidence was concluded).

(vi) that the learned Judge in the Court below was wrong in law in making any orders as regards payment of salary or the remitting of the case to the Senior Assistant Registrar for enquiry as to quantum, and naturally an entry of the judgment for the amount found, if not disputed.

In respect of this particular part of his appeal he made it clear and, on at least two occasions, informed the Court that if the respondent accepted his view in this respect he would undertake that if the constitutional and bias questions were decided against the appellant to see that payment of salary up to the date of the Court of Appeal judgment was made and thus shorten the proceedings before the Court of Appeal by rendering it unnecessary to determine these questions. Unfortunately mainly because the terms and the ramifications that would follow from their acceptance were not clearly understood by the respondent and his counsel this offer or undertaking was not accepted.

In dealing with the questions which arise for determination in this appeal, I propose to deal in the first place with the question of whether or not the admitted failure of the Adjudicating Officer, Mr. Strathairn, to inform the respondent of the punishment he proposed to recommend and give him the right to make a further statement in respect of that constituted a breach of the provisions of Article 135(1) of the Constitution. Secondly, whether the possession of and the knowledge of the contents of the findings of the Board of Enquiry must be assumed to have produced a bias in the mind of the Adjudicating Officer, Mr. Strathairn.

As to the first point the respondent relies upon, as did the Judge in the Court below, the Indian decisions. For myself, I derive no assistance from the Indian decisions having regard to the differences between the provisions of the Constitution in India and the Constitution here. It is not in dispute that the respondent had the opportunity to make and did make before the Adjudicating Officer after he had reached a finding of guilt a plea in mitigation. Put in other words, he had received and exercised the same rights as are accorded to an accused person in the Courts and I see no reason to so widely construe Article 135(1) as to give him the additional right which is sought.

As to the question of bias arising out of the possession and knowledge of the contents of the findings of at least one superior officer condemning the respondent, I was at first inclined to the view that there might be some substance in this as a ground for declaring the proceedings before the Adjudicating Officer void. This initial impression was due to a consideration of the words of Lord Thankerton in *Franklin & Ors.* v. *Minister of Town and Country Planning* [9] when he said: "My Lords, I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute". On the basis of that quotation and in particular the reference to 'coming to his adjudication with an independent mind' inclined me to support the view on this question taken by the Judge in the Court below. However that quotation must be read in the light of his Lordship's subsequent words, "I am

therefore of the opinion that the first contention of the appellants fails, in that they have not established either that in the respondent's speech he had forejudged any genuine consideration of the objections or that he had not genuinely considered the objections at the later stage when they were submitted to him". In considering these latter words it is to be remembered that the complaint in *Franklin's case, supra,* was that the Officer appointed to consider objections against a town planning plan had prior to his commencing any such hearing publicly made a statement in strong terms of his intention to ensure by legislation the carrying out of the new planning despite the objections. His speech was in such strong words that Lord Thankerton in his judgment quoted from the speech and the remark of 'gestapo' by a member or the audience. It follows, in my opinion, from the whole of the judgment of Lord Thankerton that there must be an allegation of bias by the plaintiff/respondent supported by either evidence of bias or evidence from which an inference in the terms of section 3 of the Evidence Ordinance can be inferred. This, I think, is supported by the earlier judgment in *The Colonial Bank of Australasia* v. *Willan*[10]. Bearing in mind what I have said earlier concerning the pleadings and the evidence and the fact that so far as the record is concerned this question appears to have been raised by the learned Judge in the Court below for the first time in his judgment, I have come to the conclusion that there is no evidence upon which there could be based a finding that the Adjudicating Officer actually had been, or could be assumed to be, biased to the extent of causing a breach of the rules of natural justice.

In respect of these findings it is to my mind important to remember firstly that at no stage of the proceedings either in the Court below or before us was it denied and, in fact, was admitted that the respondent had not received a copy of these findings. Secondly, that nowhere on the record of the proceedings in the Court below and in particular in the evidence does the respondent allege that Mr. Strathairn, the Adjudicating Officer, had by virtue of his having in his possession and having read these findings a bias towards the respondent. To the contrary the respondent's evidence to my mind makes it clear that he was not alleging anything against Mr. Strathairn and his adjudication beyond the two facts that he did not give him an opportunity after a decision had been come to by him to be heard on the question of dismissal, and that the respondent was deprived by the non-supplying of a copy of these findings of being heard in answer to the allegations in the findings.

An important fact on the record of this case going to establish bias or lack of bias is that it is clear that the Adjudicating Officer declined to call — although he had been expressly directed by his senior officer — to call at the disciplinary proceedings — two witnesses whose evidence he described as being too prejudicial to the respondent.

Finally in dealing with the question of bias I bore in mind the words of Viscount Cave L.C. in *Frome United Breweries Company Limited* v. *Keepers of the Peace and Justices for County Borough of Bath*[11]:

> "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others. Thus in *Reg.* v. *London County Council Ex parte Akkersdyk*, where a committee of the London County Council had recommended that a certain music and dancing licence should not be granted, and some members of the committee had instructed counsel to represent them before the county council and to oppose the application for the licence, it was held that the presence at the hearing of those members of the committee who had instructed counsel to oppose the application vitiated the proceedings, and a rule for a mandamus to hear and determine the application according to law was made absolute. In an Irish case, *Reg. (Monaghan County Council)* v. *Local Government*, where the authority concerned was the Local Government Board of Ireland, a similar decision was reached. Instances of the application of the like rule to licensing justices in England are *Rex* v. *Sunderland Justices* and *Colchester Brewing Co.* v. *Tendring Licensing Justices.*
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> From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated".

In considering that *dicta* I bore in mind the facts of that particular case, namely, that before hearing three members of the compensation tribunal had made themselves a party to the proceedings by having instructed in their capacity of justices a solicitor to oppose the renewal of the licence upon which the right or claimed compensation was based. Viscount Cave in that part of his judgment which I have quoted referred to the fact that in such a position a bias must be assumed. Having regard to all the facts that appear on the record of this case so far from being satisfied that a bias as against Mr. Strathairn must be assumed on this particular ground, I am satisfied from the fact that the respondent did not allege such a personal bias and from the fact that notwithstanding his superior's directions Mr. Strathairn declined to call the two witnesses whose evidence was unduly prejudicial to the respondent that there was in fact and in law no sufficient bias either proved or to be assumed that Mr. Strathairn did not decide the question of guilt or otherwise strictly impartially.

As regards the constitutional questions that arise out of this appeal, namely, as *at the relevant date who had the right to appoint as well as dismiss an officer of the grading of the respondent*; and whether the learned Judge in the Court below properly exercised the powers given to him by Clause 6 of Article 162, I approach

these questions with considerable diffidence. My diffidence is caused not only by my endeavours to construe the Constitution as a whole but also by the knowledge of the fact that the view I hold is not shared by the other members of the Court of Appeal. I might at this stage state that the Court did not receive from counsel appearing before it on the constitutional questions the help that it was entitled to have received. Our attention was not drawn to Article 4 of the Constitution (which would become relevant if one accepted the submission on behalf of the appellant) nor to Article 176 (which is most important when one remembers that both Inspector Kanda (page 33 of the record) and the Commissioner of Police Mr. Carbonell were pre-merdeka Officers). Also attention was drawn in the written submissions of the Attorney-General to the distinction between existing law on the one hand and Federal or State law on the other hand, but no attempt was made to develop this argument. As regards Article 4 the attention of the Attorney-General's junior — after the Attorney-General had left the Court — was directed to this Article and it was dealt with by him. But at no time did any of the counsel draw our attention to the existence of Article 176 so that I find myself in the position of having to consider it without the assistance of counsel's argument.

In coming to my conclusions as to the interpretation to be placed upon Article 144 of the Constitution I have borne in mind the *dicta* that have fallen from the lips of many Judges in the United Kingdom that one should not in interpreting a statute take the words out of their context and endeavour to assign to them what has been described as the ordinary everyday meaning. As has been said, it is extremely doubtful whether any set of words has anything such as an ordinary everyday meaning but that the entire provisions have to be considered and the meaning obtained therefrom. In this connection I will quote the words of Lord Greene in *In re Bidie*[12]: "The first thing to be done, I think, in construing particular words in a section of an Act of Parliament is not to take those words *in vacuo*, so to speak. and attribute to them what is some times called their natural or ordinary meaning in the sense that their meaning is entirely independent of their context. The method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of *prima facie* meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question. 'in this statute, in this context, relating to this subject-matter, what is the true meaning of that word?'" This, with respect, appears to me to have been the fallacy into which, as is apparent from his written submissions, the Attorney-General has fallen because he seeks amongst other things to interpret Article 144 as it stands alone although he does add to that interpretation the statement based upon Article 162 that the existing laws continue in force and in effect. This is made, I think, extremely clear when he relies upon Article 162(1) standing alone and without any reference to Clauses 4 and 5. Again his method of approach to the problem has led to an overlooking of the point with which I shall deal later in detail that the jurisdiction of the Police Service Commission being given by Article 140 (and we are concerned with the original Article and not with its recent amendment) was granted to the Commission extending to all members of the Police service and not to gazetted Police Officers only. In Article 144(1) it is the duty which is made subject to the provisions of any existing law and the provisions of the Constitution. In my opinion there is a distinction between the terms, "jurisdiction", and "duty", — a jurisdiction may be given with limits placed upon the manner in which the duties are to be performed. It would, in my opinion, be correct to say that an unlimited jurisdiction is given but in the exercise of that jurisdiction, that is to say, in the performance of the duties limitations are either placed on the duty or the manner in which that duty is to be performed. This distinction is I think made clear especially in dealing with constitutions by Griffith, C.J. in *D'Emden* v. *Pedder*[13] when he said, "It is only necessary to mention the maxim *quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest.* In other words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of Government." The same distinction is, in my opinion, made clear by the distinction which Atkin L.J. draws in *Rex* v. *Electricity Commissioners*[14] between the legal authority to determine something and the duty to act pursuant to that authority. I have mentioned this at this stage solely with reference to my valuation of the Attorney-General's submissions. For myself, I consider that one is forced in construing Article 144 to construe it in conjunction with Articles 4, 140, 162 and 176. The interpretation that one reaches considering all of those Articles should then be tested as against the other and not the immediately relevant Articles in which the words, "subject to," appear in order to see how much damage one is forced, if at all, to do to the maxim that one ought to give in the one document or statute the same meaning to the same phrase throughout. Before one can come to any conclusion one has, to my mind, to consider what it is that is being done in the promulgating of a constitution. Before dealing with this, the Attorney-General in his submission suggested to the Court that some assistance in appreciating the historical approach to the problem could be obtained from paragraph

158 of the Report of the Reid Commission wherein the necessity for the continuance of the powers of the Commissioner of Police is referred to. For myself I prefer to leave the Reid Commission Report out of my considerations because whilst the Report does contain the quotation referred to by the Attorney-General it is equally true that when the Commission came to recommend a draft constitution it agreed on a form providing for a Police Commission of which the Commissioner was only one member out of three. This, in my opinion, completely negatives any value the quotation in the Report may have had. It cannot be overlooked as well that what has been described during the hearing as the body of founding fathers of the Constitution has by providing in the actual as opposed to the draft Constitution for a tribunal on which the Commissioner of Police has no voice whatsoever made clear their intention of acting contrary to the Report in this respect. To turn to my appreciation of the position before promulgation, it must, I think, be accepted that any State, sovereign or otherwise, has a constitution of sorts and if it is intended to produce a fresh and new constitution, it must be accepted that the promulgation of a new constitution means the end of any laws existing on the date of promulgation of the new constitution and the cessation in office of and the loss of all powers or functions of officers and tribunals in service prior to the promulgation unless, and to the extent only, those powers are by the new constitution permitted to continue in existence. If the problem is approached from this angle, to my mind, it is clear the Constitution provides for a Police Service Commission whose jurisdiction (unlimited and unqualified) shall extend to all members of the police service, and the performance of its duties is subject to Article 144, and as I have pointed out Article 144 deals with the duty and the manner in which the jurisdiction is to be exercised but does not detract from the jurisdiction granted. It must also I think be borne in mind that having regard to the fact that on promulgation all existing laws unless saved cease to have any effect, and that all officers and tribunals necessary to the operation and normal functioning of a State cease to exist or to have any powers or functions, it is necessary to have provisions of a temporary and transitory nature in order to prevent the whole business of the State coming to a standstill. To take an illustration pertinent to our problem the Yang di-Pertuan Agong cannot function until he has been installed and taken the oath of office. Secondly, it is only thereafter he can appoint members of a Police Commission and there must of necessity be some time lag as well while the consent of the persons concerned is obtained. It is therefore not only in connection with the Police Force but in every sphere necessary to have some provisions in the Constitution enabling someone else during that *interregnum* to carry out the functions of Government and in particular to exercise the necessary control over members of the Police Force. That this is appreciated is shewn by the fact that the persons responsible for the Constitution have in Part XIII commencing with Article 162 provided, to quote the headnote, "Temporary and Transitional Provisions". When one reads Article 162 in its entirety and Article 176 one is forced to the conclusion that the words, "subject to existing law", mean no more than Denman C.J. said they meant — in a case to which I shall refer later — namely, within the limits or limitations of practice. It was the Attorney-General's submission that no jurisdiction had been given to the Police Service Commission because its duty was subject to the existing law under Article 144 and that if the existing law provided for the exercise of power to appoint and dismiss by the Commissioner of Police he had the powers to appoint and the Commission had none. If that had been the intention of the persons responsible for the Constitution then I personally fail to see why there was any necessity for the inclusion of Article 176. On the other hand, if his submissions be not correct, both 176 and 162 become vitally necessary to cover the interim period. In my opinion the persons responsible for the Constitution intended to make that abundantly clear when they headed Part XIII, "Temporary and Transitional Provisions", that is to say, to enable the smooth transition from one constitution with its subordinate bodies to the new constitution with its fresh set of subordinate tribunals. It is made even clearer by Clauses 4 and 6 of Article 162. That, of course, brings us to the problem of when does a temporary and transitional provision under the Constitution cease to be effective. Before dealing with that it is pertinent I think to refer to the submission made in Court by the Attorney-General that the Police Service Commission had not come into existence or did not exist. This submission, in my opinion, was incorrect because Article 148(1) refers to the Commissions established under Articles 139 to 141 not I would point out to be established. Again it is to be noted that by *Gazette* notification 733 — admittedly not published until 1960 — notification was given of the appointment by the Yang di-Pertuan Agong (the authority for appointment of members of the Police Service Commission) as from the date on which the Constitution came into force and effect. To return to the question of the length of time the temporary and transitional provisions continue in operation, I would say that, having regard to what one may describe as the facts of life affecting the Constitution and which I have referred, it was until the body or tribunal to whom under the Constitution the powers and functions are being transferred can operate. During the course of argument Article 4(1) came up for consideration and it was suggested that the words, "and any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency be void", led to the inference by applying the maxim *expressio unius exclusio alterius* that as against existing law the Constitution was not supreme. I am unable to agree with this suggestion as in

my opinion the Constitution "kills" existing law and that existing law can only survive by virtue of the provisions of the Constitution, that is to say, the validity in continuance of the existing law depends upon the Constitution itself. One can almost say it creates it or at least that it re-creates it. Again, to draw the inference that was suggested to my mind overlooks the elementary principle of constitutional law that a constitution especially a constitution in writing is fundamental. In my opinion after a consideration of the Constitution in its entirety the combined effect of Articles 140 and 144 is to create a Police Service Commission with jurisdiction over all members of the police service which Commission shall perform its duties in accordance with the principles of and the procedure created by existing law as at Merdeka Day.

To test the conclusion to which I have come by following the method of approach adopted by the Attorney-General in his argument and endeavouring to give to the words, "subject to," their ordinary meaning, I have searched — and I hope diligently — the various authorities in which the words, "subject to," have been the subject of construction by the Courts. The Attorney-General was content to rely upon one small quotation from an American work in which words and phrases judicially interpreted in America have been brought together under the appropriate headings. He relied upon one quotation only. Apart altogether from the inadvisability of relying upon an American work, a checking of the actual pages dealing with the phrase, "subject to," shows that the Courts in America (without checking in detail) have given many and varied interpretation to the phrase: one might almost say as many if not more has been given to them in the Courts of the British Commonwealth. My research in the law reports and text books of the British Commonwealth has shown that the Courts have given to the words, "subject to," not one meaning but varied meanings. They range from the words, "subject to," having the effect of the words following it negativing the statement preceding it as is particularly to be noticed in the long line of authorities dealing with the phrase, "subject to contract," "subject to lease," etc. This particular meaning of the phrase, "subject to," was referred to by Stout C.J. in the New Zealand case of *Benge & Pratt* v. *Guardian Assurance Company*[15] when he said, " 'subject to' must mean from that point of view 'swallowed up' or 'negatived by'." The meanings in the various authorities in the British Commonwealth go to the other extreme in limiting their effect as did Denman C.J., in *Rex* v. *Churchwardens of St. James, Westminster* [16] when he said, "The language is not entirely free from doubt; but, considering that a certain custom had long prevailed without question, the phrase, 'subject to the laws and statutes now in force,' must be taken as a description of the existing *practice*." This diversity of meaning and the need to consider the entire document are emphasised when we note in two decisions of the Privy Council one year apart the judgment of the same Law Lord, Lord Simonds, where the words, "subject to," are given the contradictory meanings of "without prejudice to" that is to say with no restriction on what is being qualified and " the words subject to . . . . . are naturally words of restriction". The two cases I refer to are *Smith* v. *London Transport Executive* [3] and *Akistan Apena of Iporo* v. *Akinwande Thomas*[17]. Remembering the words of Maugham J., in *In re Dunkley* v. *Sullivan*[18] where he held that the words, "subject to the provisions contained in the will", must mean "subject to all the provisions of the will which remain operative and effective," I have come to the conclusion that the meaning which reading the Constitution as an entirety and having regard to the consideration of what is happening on the granting of a fresh Constitution, I ought to give to the words, "subject to," is following Denman C.J. "Subject to the procedural limitations of," or alternatively to follow the wording of Lord Simonds in *Smith's* case and to say the jurisdiction is given to be exercised "within the restrictions or limitations imposed by," and this meaning is well within the limits of the range of meanings given to the words, "subject to," by the Courts throughout the British Commonwealth; and although I deprecate — as has been done by others before me — extracting a word from its context to ascertain its meaning, having extracted it I see no reason for altering or doubting the correctness of the interpretation I have given it as a whole. My conclusion I think can be tested in another way. The Attorney-General in his submission limited the words, "existing law," as opposed to Federal and/or State law to the body of law as it existed prior to Merdeka Day unaltered. To use the words contained in paragraph 9, page 3, of his written submissions: "It is important to observe that it does not refer to a law which was in operation on Merdeka Day but to one in operation immediately before that day. That excludes any question that "existing law" in Article 144(1) means a law modified in accordance with Article 162 because of course Article 162 was not itself in operation immediately before Merdeka Day". Whilst I am not in agreement with his reasoning the wording and the definition "existing law" taken in conjunction with the use of the terms Federal and/or State law to cover or rather to describe existing law at the point of time after Merdeka would have forced me to the conclusion in accordance with the submission that the term existing law does not cover existing law amended or modified on or after Merdeka Day had it not been for the wording of Article 162 and in particular Clause (3) thereof which inclines me to the view that it was intended to take advantage of the reservation of "unless the context so requires" in Clause (2) of Article 160. In my opinion, however, that construction so far from assisting the arguments of the Attorney-General shows that the Attorney-General's suggested meaning

should not be given to the words, "subject to". Accepting, for the sake of argument, his interpretation of existing law then if one gives to the words, "subject to," the negativing effect to the remainder of Article 144 that he suggests then there never can be a Police Service Commission operating as provided by the Constitution because on his submission the Commissioner of Police would be entitled to say at all times that he had the power under the law as it existed prior to Merdeka and that the Commission whose duties were subject to existing law could never obtain the right to exercise any of its duties. I am forced to decline to accept his interpretation of the words, "subject to," as it would mean there could never be an effective Police Service Commission with jurisdiction extending to all members of the Police Service. On the other hand we note that if the words, "subject to," are given in the light of the whole Constitution the meaning that I have put forward then without interfering with the definition of existing law the difficulty is overcome. Although I am certain in my own mind as to the construction to be placed upon the definition of existing law as opposed to Federal or State law one can still in my opinion include amendments, variations and modifications to existing law after Merdeka and still constitutionally reach the impossible situation if one gives to the words, "subject to," the interpretation claimed by the Attorney-General. In this connection one should consider the fact that it is not under the Constitution every piece of legislation of Parliament which can amend the Constitution. And, again, it is not, with respect, His Majesty the Yang di-Pertuan Agong or the Courts of this country that can amend the Constitution. When one considers that then I think one is placed in the position of saying that if the meaning for the words, "subject to," claimed by the Attorney-General is the correct one the action or rather the lack of action by His Majesty or by a bare majority of Parliament could continue the powers of the Commissioner of Police to the exclusion of the body which the Constitution has said shall have jurisdiction over all members of the service. I have not overlooked that part of the Attorney-General's submission in which he endeavours to deal with this aspect when at page 4, paragraph 14, he says that the Police Service Commission would be left with the powers of appointment and discipline in respect of gazetted police officers. For myself I am unable to accept this submission. Section 8(1) of the Police Ordinance No. 14 of 1952 provides that gazetted police officers shall be appointed in the same manner as other public officers of corresponding status in the service of the Government of the Federation and shall be subject to the same disciplinary provisions. The Attorney-General suggests that the application of the Constitution to that section will mean that they come directly under the power of the Police Service Commission. With that submission I am unable to agree. If his interpretation of the words, "subject to," be correct then gazetted police officers are appointed by the pre-merdeka tribunal of the Civil Service Appointments and Promotions Board; or if the wider meaning be given to the term, "existing law," then they will come under the jurisdiction of the Public Services Commission under Article 139. There is nothing in the Constitution which applied to section 8(1) as would make necessary any modification of section 8(1) although it would be open to the Yang di-Pertuan Agong under his powers of expediency to have modified section 8(1) to provide for the Police Service Commission having the power as at the relevant dates. As far as we are concerned there was no modification of section 8(1) of the Police Ordinance. I doubt myself whether this method of interpretation is permissible but even if it is permissible then it is clear that given the interpretation put forward by the Attorney-General the Police Service Commission will not by virtue of the Constitution have any powers to deal with gazetted officers because the existing law has given the jurisdiction to another constitutional body. But in any case the words of Article 140(1) are clear, the jurisdiction extends to all (not some) of the members of the police service as it was then called. Although I would not carry it to any great extent some support for the interpretation I have given is provided by the existence of Clauses 3, 4 and 6 of Article 144 of the Constitution. They certainly establish the fallacy in the statement by the Attorney-General that the Police Service Commission and other Commissions were not in existence legally on Merdeka Day and also the necessity for their insertion does support the statement that the bodies or tribunals given a jurisdiction by the Constitution are not limited in their jurisdiction by existing law. Being of the opinion that the method of interpretation I referred to earlier is the correct one to apply to a constitution I have asked myself the same questions and find myself forced to the conclusion that the words, "subject to existing law," mean no more than that the jurisdiction is given to the Police Service Commission as and when appointed but that it has to exercise that jurisdiction or perform its duties within *inter alia* the limits of the laws existing at Merdeka Day. To put it another way to emphasize the conclusion to which I have come as to what was meant by Lord Simonds in *Smith* v. *London Transport Executive, supra* — the duty is to act within the limitations or restrictions imposed by existing law or the Constitution — I find nothing in the words of Lord Simonds in *Smith's* case especially when considered in the light of his interpretation of similar words one year earlier in *Akisatan Apena's* case which forces one to state that the restriction on the duty is of necessity one of jurisdiction but may be only one of procedure as in the case decided by Denman C.J. earlier. The correctness of this interpretation is in my opinion emphasized when one considers the application of Article 176 to the facts of this particular case and what had to be decided, namely, — did Carbonell as Commissioner of Police have power to dismiss Inspector

Kanda? To decide this involves the answering of two questions —

1. What were the rights of Inspector Kanda? and
2. What were the powers of the Commissioner of Police Carbonell over him?

To deal with the first question. The unchallenged and undenied statement of the respondent that on 1st June, 1953 he was confirmed in the rank of Police Inspector establishes him as a pre-merdeka officer. His powers functions and most important his rights must be founded on Article 176. I pause here to draw attention to the difference in wording between Articles 174, 175 and 176, and to point out that although no restriction on the existing law by virtue of the Constitution is imposed by Article 162 a restriction in the operation of that existing law is imported by Article 176 as regards the powers, functions (and most important) the rights of Inspector Kanda. I should perhaps add that a diligent search of the *Government Gazettes* has not disclosed the fresh appointment after Merdeka Day of respondent or Carbonell. Even applying the interpretation submitted by the Attorney-General cannot the respondent justifiably say, "by virtue of Articles 176 and 141 I am under the sole jurisdiction of the Commission since concurrent jurisdictions are not possible?" I think he can. I would, however, point out that if the Attorney-General's construction is applied to Article 176 the words "and subject to existing law" are meaningless because they already exist in the last lines of Article 176.

To come now to the question of the powers of Carbonell, the record gives me no assistance as in the case of Kanda. If I am permitted, which I doubt, to have reference to the *Government Gazettes,* then he is in the same position as Kanda in which case if you use the interpretation of the Attorney-General he has by virtue of Article 140 lost his power unless you can have concurrent jurisdictions because his power under Article 176 is subject to the restriction imposed by Article 140. In any case, it is unanswerable that Carbonell's powers must be dependent on whether his appointment is pre-merdeka or post-merdeka by His Majesty. If it be the latter, it seems to me the interpretation of the learned Attorney-General would leave the Court in the dilemma of having to decide the answer to the question of priority as between chicken and the egg, or as between the clear constitutional rights of Kanda and according to the learned Attorney-General the clear power of the Commissioner of Police Carbonell. I cannot conceive that the learned draftsmen of the Constitution intended this and it seems to me I am forced to reject the interpretation put forward by the learned Attorney-General and to seek another interpretation. The interpretation I have given of the relevant phrase besides giving effect to all the words used in Article 176 solves this dilemma.

I have not overlooked the fact that if my interpretation be correct then it would mean that constitutionally the Police Service Commission in this particular case would have to deal with every minor disciplinary offence committed by any member of the police force. That, of course, must be admitted but in my opinion it is not (as submitted by Attorney General) a factor which affects the otherwise clear meaning of the Constitution read in toto. This is made even clearer when one notes the power of delegation given to all Commissions in the Constitution. It clearly establishes, to my mind, that the persons responsible for the Constitution foresaw this particular difficulty and inserted the powers to delegate to cover the position. In fact, one could go further since it is the Constitution which is being interpreted and say that the Constitution clearly intends that there should be a delegation. For those reasons, in my opinion, Rigby J., was right when he held that the Constitution had given the power to appoint and to dismiss police officers to the Police Service Commission to the exclusion of the prior existing powers of the Commissioner of Police. It cannot, in my opinion, be overlooked that the submission of the learned Attorney-General gives no meaning to the words, "and of this Constitution." The point was not dealt with by him but it seems to me that the only argument open to him would be to submit that in the event of conflict when interpreting Article 144 the existing law prevailed because of the actual wording but this argument would be answered by pointing out that the converse must be the case in interpreting Article 176 and the dilemma I have mentioned would then arise. If to avoid the dilemma one gives to the word "and" the meaning of "or" then in my opinion you are forced back to the basic principle that a written constitution is fundamental.

In case I am wrong in this I have to consider whether as is relied upon by Rigby J. Clause 6 of Article 162 had to be applied. The answer to this question depends upon the meaning to be given to the word, "necessary," bearing in mind the distinction to which the Attorney-General drew attention between the powers of the Yang di-Pertuan Agong to modify and the powers of the Court, namely, that His Majesty was entitled to modify for reasons of expediency. I have reached the conclusion that the words, "necessary," (although I do not attempt to provide a full definition of the word) must include what is essentially required to give effect to the Constitution. In my opinion even if I be wrong in my interpretation of the Constitution as set out above, the use of Clause 6 of Article 162 by the Courts has become necessary to give effect to the permanent provisions of the Constitution and, in particular, Article 140, unless I read for the words, "all members of the police service," the words, "gazetted police officers only," and this with respect to the other members of the Court I find myself unable to do. In my opinion it is the duty of the Courts to make the necessary modification. I would therefore agree with

Rigby J., that if the construction previously given is at fault, the Court is under a duty to bring into operation Clause 6 of Article 162. It was mentioned by the Attorney-General in the course of his argument that the modification under Clause 4 of Article 162 by His Majesty in respect of any other provisions of an existing law would preclude the exercise by the Court of its power under Clause 6. The Attorney-General beyond making this submission did not develop the argument, and I am not certain how far he wished that submission to be taken. In my opinion, however, having regard to the wideness of His Majesty's power and the definition of the term, "law", this argument is fallacious. In any case it is purely academic because the time for modification by His Majesty has now expired and at the most it could only be taken as far as a statement that the Courts would have to consider the Constitution as modified by His Majesty at the time of consideration. The Attorney-General then proceeded to deal with the remitting by the trial Judge of the proceedings to the Registrar to take an account and for necessary consequential orders following on that account. It was the submission of the Attorney-General that on the law of the Federation as set out in the Enactments and cases to which he makes reference in his written submissions a judgment cannot be entered against the Government of the Federation. How far those pre-merdeka judgments are affected by the new Constitution is not clear to me but I find it unnecessary in the light of the undertaking twice repeated by the Attorney-General to make a decision thereon. The reason for this will be clear when reference is made to the actual order which I would make on this appeal.

For myself I would grant the appeal to the extent of deleting from the declaration the words, "and still is a member of the force," and substituting the words, "and was at the date of filing of the suit a member of the force".

As regards the remitting to the Registrar, I would order a stay of that part of the order pending a further order of this Court.

In view of the judgments of the majority of the Court I would content myself on the question of costs with saying I see no reason why the successful party should not get his or its costs.

I note that I have not dealt with the so-called cross-appeal. I have not done so because when the question was raised during the hearing by the learned Chief Justice — I am not certain whether counsel for the respondent withdrew or abandoned it — but if it still remains extant, in my opinion, it is not a cross-appeal in that it is not sought on behalf of the respondent to set aside the order or the judgment in the Court below or any part thereof. It is therefore not a proper cross-appeal. It is no more, in my opinion, than respondent's reasons additional to the judgment of Rigby J. to support the actual judgment in the Court below.

Appeal allowed.

Cross-appeal dismissed.

SHELL CO. OF THE FEDERATION OF MALAYA LTD. v. CHAIRMAN, MUNICIPAL COUNCIL

[C.A. (Thomson C.J., Good J.A. and Ismail Khan J.) March 8, 1961]

[K.L. — F.M. Civil Appeal No. 67 of 1960]

Practice and Procedure — Appeal from statutory body — Commencement of — R.S.C., O.59 r.13(1) — Motions — O.52 — Lack of Compliance with O.52 r.4 — Irregularity curable under O.70 — Town Boards Enactment (Cap. 137), s.44.

The appellants were dissatisfied with a decision of the Municipal Council as to the rateable value of their property. They appealed under section 44 of the Town Board Enactment, (Cap. 137) filing in the Registry at Kuala Lumpur a document headed "Notice of Motion" stating that the Court would be moved for an order that the decision of the respondent should be varied on certain specified grounds. The respondent gave notice that they would oppose the motion on the ground that it was not supported by an affidavit as required by O.59 r.13(1) and as such it should be struck out. Hashim J. in the Court below upheld the respondent's contention, and on appeal,

Held: (1) the appellants had satisfied the letter and spirit of the condition laid down in section 44 of the said Enactment by filing a notice setting out the grounds of appeal;

(2) except in cases covered by rule 4 of O.52, affidavits may be filed up to the time of making the motion. A lack of strict compliance with this rule may well be an irregularity capable of being cured under the provisions of O.70 and is not necessarily fatal to the validity of the motion.

(3) O.59 r.13(1) makes it clear that the grounds of appeal must be set out in the motion itself. The affidavit mentioned in this rule which in the discretion of the Court may be supplemented at this hearing by oral evidence is the evidence on which the Court is to be asked to consider the grounds of appeal which have been set out.

Cases referred to:—

(1) *Hampden* v. *Wallis* 26 Ch. D. 746.
(2) *Petty* v. *Daniel* 34 Ch. D. 172.
(3) *Stock* v. *Central Midwives Board* [1915] 3 K.B. 756.
(4) *Allender* v. *Council of the Royal College of Veterinary Surgeons* [1951] 2 All E.R. 859.
(5) *Rembha Bai & Ors.* v. *Jasani* [1960] M.L.J. 306.

COURT OF APPEAL.

A. L. Hills for the appellant.

R. Ramani for the respondent.

Cur. Adv. Vult.

Thomson C.J.: These appellants are the owners of property within the Kuala Lumpur Municipal area who are dissatisfied with a decision of the Municipal Council as to the rateable value of their property. The date of that decision would appear to be 1st July, 1960.

By reason of section 44 of the Town Boards Enactment (Cap. 137) the appellants were entitled to appeal against that decision to the Supreme Court and sub-section (ii) of that section provides that :—

"Every such appeal shall be commenced within fifteen days of the date of the certificate of the Board."